IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I. THOMAS KOLODIJ	:	CIVIL ACTION
	:	
v.	:	
	:	
CONSOLIDATED RAIL CO.	:	NO. 97-5620

MEMORANDUM AND ORDER

HUTTON, J. November 9, 1998

Presently before the Court are Defendant's Motion for Summary Judgment (Docket No. 5) and Plaintiff's response thereto (Docket No. 7). Also before the Court are Plaintiff's Motion to Modify the Scheduling Order (Docket No. 6), Plaintiff's Motion to Delay Decision on Defendant's Motion for Summary Judgment (Docket No. 8), and Defendant's response thereto (Docket No. 9). For the reasons stated below, the Plaintiff's Motion to Delay is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED WITH LEAVE TO RENEW** following close of discovery.

I. BACKGROUND

Defendant Consolidated Rail Co. ("Conrail" or Defendant) employed Plaintiff I. Thomas Kolodij as Director of Financial Information Systems. Defendant terminated Plaintiff effective July 1, 1995. Plaintiff then brought this suit claiming Defendant terminated his employment in violation of the Age Discrimination in

Employment Act, Americans with Disability Act, and the Pennsylvania Human Relations Act.

On June 10, 1998, Defendant filed a Motion for Summary Judgment. In Defendant's motion, Defendant argues that Conrail terminated Kolodij because he had the lowest job performance rating compared to other individuals in his department. As support for this argument, Defendant attaches the affidavit of Roger Mehl, the Senior Director of Plaintiff's department. Plaintiff responded to this motion, but also filed a Motion to Amend Scheduling Order and a Motion to Delay Decision on Defendant's Motion for Summary Judgment. In Plaintiff's motion, Plaintiff requests additional time to complete discovery.

II. DISCUSSION

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323

(1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmoving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

The Court, however, may deny summary judgment if the motion is premature. See Anderson, 477 U.S. at 250 n.5. Because a plaintiff should not be "'railroaded' by a premature motion for summary judgment," the United States Supreme Court has held that a district court must apply Federal Rule of Civil Procedure Rule

56(f) if the opposing party has not made full discovery. Celotex, 477 U.S. at 326. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f) (emphasis added). Thus, the district court is empowered with discretion to decide whether the movant's motion is ripe and thus determine whether to delay action on a motion for summary judgment. See St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1313 (3d Cir. 1994); Sames v. Gable, 732 F.2d 49, 51 (3d Cir. 1984).

In order to preserve the issue for appeal, Rule 56(f) requires the opposing party to a motion for summary judgment to file an affidavit outlining the reasons for the party's opposition. See St. Surin, 21 F.3d at 1313; Galgay v. Gil-Pre Corp., 864 F.2d 1018, 1020 n.3 (3d Cir. 1988); Dowling v. City of Phila., 855 F.2d 136, 139-40 (3d Cir. 1988). The United States Court of Appeals for the Third Circuit has consistently emphasized the desirability of full technical compliance with the affidavit requirement of Rule 56(f). See St. Surin, 21 F.3d at 1314; Radich v. Goode, 886 F.2d 1391, 1393-95 (3d Cir. 1989); Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989); Dowling, 855 F.2d at 139-40. But see Sames, 732 F.2d at 52 n.3 (finding opposing party's failure to strictly

comply with Rule 56(f) not "sufficiently egregious" to warrant granting summary judgment).\[1] Nevertheless, failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration. See St. Surin, 21 F.2d 1314. The Third Circuit stated that if a Rule 56(f) motion does not meet the affidavit requirement, the opposing party "must still 'identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'" Id. (quoting Lunderstadt, 855 F.2d at 71). The opposing party, however, must be specific and provide all three types of information required. See, e.g., Radich, 886 F.2d at 1394-95 (affirming district court's grant of summary judgment when opposing party only identified several unanswered interrogatories and failed to file affidavit, identify how unanswered interrogatories would preclude summary judgment, or identify information sought).

In the present matter, the Plaintiff argues that summary judgment is premature because he has not yet completed discovery. The Plaintiff has not filed a Rule 56(f) affidavit and, thus, has not complied with the Third Circuit's mandate of strict compliance with the affidavit rule. Therefore, Plaintiff must identify with specificity what particular information is sought; how, if

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[1]/ Some federal circuit courts of appeals have liberally applied the affidavit requirement of Rule 56(f). See, e.g., International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1267 (5th Cir. 1991) (requiring only statement of party's need for additional discovery), cert. denied, 502 U.S. 1059 (1992).

uncovered, it would preclude summary judgment; and why it has not previously been obtained. See St. Surin, 21 F.2d 1314.

In his motion, Plaintiff states that he may not be able to supply the Court with evidence to contradict several of the factual assertions made by the Defendant in its Motion for Summary Judgment because he was unable to take the deposition of the Senior Director of his department, Mr. Mehl. Particularly, Plaintiff contends that Mr. Mehl is an essential witness who Defendant relied upon in its Motion for Summary Judgment. This information, he argues, is essential for determining whether summary judgment is appropriate, because it will allow the Court to ascertain whether Conrail's articulated business reason for Plaintiff's termination was pretextual.

After reviewing the pleadings, motions, and briefs, this Court finds that the Plaintiff identified information that has yet to be discovered, shown that this information will affect summary judgment, and shown why the discovery has not previously been obtained. See St. Surin, 21 F.3d at 1314 (quoting Lunderstadt, 855 F.2d at 71). In Defendant's Motion for Summary Judgment, it essentially argues that: (1) Plaintiff cannot offer proof of a prima facie case of age or disability discrimination and (2) Plaintiff cannot offer evidence that Defendant's articulated reason was pretextual because Defendant offered a legitimate business reasons for termination. An essential part of Defendant's motion

is the affidavit of Mr. Mehl who states that he terminated Kolodij because of the four employees under his supervision, Kolodij had the lowest job performance. Thus, Plaintiff showed that Mr. Mehl's deposition is the evidence necessary for discovery and how this evidence would be critical in his defense of summary judgment.

Moreover, Mr. Mehl resides in the Dominican Republic. For this reason, Plaintiff has been unable to take Mr. Mehl's deposition. Defendant states that he offered Plaintiff the opportunity to take Mehl's deposition on June 3, 1998 in the Dominican Republic. Defendant argues that because Plaintiff did not seize this opportunity, he should now not be able to use it as an excuse to delay this Court's decision on summary judgment. This date, however, was only a week before Defendant's filed their summary judgment motion. Further, the deposition had to take place in a foreign country.\[2] Therefore, the Court concludes that Plaintiff satisfactorily showed why this evidence has not yet been discovered.

Because the Plaintiff satisfied the three requirements of delaying a decision on summary judgment, this Court is required to give him adequate time for discovery. See Dowling, 855 F.2d at 139. Therefore, because Rule 56(f) grants the district court

[2] The Court notes that it has great discretion in designating the location of the taking of a deposition under Federal Rule of Civil Procedure 30(b). See South Seas Catamaran, Inc. v. Motor Vessel "Leeway", 120 F.R.D. 17, 21 (D.N.J. 1988). In determining the location of a deposition, the Court should consider the facts and equities. See id.

discretion to “order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just,” the Defendant’s Motion for Summary Judgment is hereby denied with leave to renew following the close of discovery.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I. THOMAS KOLODIJ	:	CIVIL ACTION
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v.	:	
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CONSOLIDATED RAIL CO.	:	NO. 97-5620

O R D E R

AND NOW, this 9th day of November, 1998, upon consideration of the Defendant's Motion for Summary Judgment (Docket No. 5), Plaintiff's response thereto (Docket No. 7), Plaintiff's Motion to Modify the Scheduling Order (Docket No. 6), Plaintiff's Motion to Delay Decision on Defendant's Motion for Summary Judgment (Docket No. 8), and Defendant's response thereto (Docket No. 9), IT IS HEREBY ORDERED that the Plaintiff's Motion to Modify Scheduling Order and Motion to Delay are **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED WITH LEAVE TO RENEW** following close of discovery.

IT IS FURTHER ORDERED THAT the Court has issued an Amended Scheduling Order extending discovery until January 5, 1999 to allow discovery to proceed for the purpose of deposing Mr. Roger Mehl.

BY THE COURT:

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HERBERT J. HUTTON, J.